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IN THE

Supreme Court of the United States

October Term, 1960.

No. 448.

BOARD OF PUBLIC EDUCATION,
SCHOOL DISTRICT OF PHILADELPHIA,
Petitioner,

v.

ANGELINA INTILLE, THOMAS DEACON
and SADIE T. ATKINSON,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania.

Brief for Respondents in Opposition.

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Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION.

OPINIONS BELOW.

The opinions in the Supreme Court of Pennsylvania and in the Courts of Common Pleas of Philadelphia County are appended to the Petition for Writ of Certiorari.

JURISDICTION.

Petitioner has invoked the jurisdiction of this Court under Title 28 U. S. C., Section 1257(3). But the Supreme Court of Pennsylvania has held in these cases that public school teachers having tenure may not be dismissed on the statutory ground of "incompetency" as contained in the Pennsylvania School Code of 1949, Art. XI, § 1122, where the charge of incompetency is based solely on the fact that

the teachers, while being questioned by a Congressional Committee, refused to answer questions as to past Communist Party membership on the basis of a Fifth Amendment claim of privilege. No question under the Constitution or laws of the United States is raised by this decision.

The Pennsylvania Supreme Court also held that the dismissals of these teachers violated the due process clause as well as the privileges and immunities clause of the Fourteenth Amendment to the Federal Constitution. The fact remains, however, that the Pennsylvania Supreme Court held respondents' dismissals invalid because, as a matter of state law, their conduct did not amount to incompetency. The decision, therefore, was based on adequate non-federal grounds and there is no question over which this Court has jurisdiction.

QUESTION PRESENTED.

Should this Court review a decision of the Pennsylvania Supreme Court holding that the refusal, on a plea of the Fifth Amendment privilege, by public school teachers having tenure, to answer questions as to past Communist Party membership asked by a Congressional Committee, did not constitute incompetency within the meaning of the Pennsylvania Public School Code of 1949, simply because that decision also ruled that the dismissal of petitioners deprived them of constitutional rights?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The constitutional and statutory provisions are set out in the Petition for Writ of Certiorari. An additional statutory provision involved is the Pennsylvania Loyalty Act of December 22, 1951, P. L. 1726, §§ 3, 5, 6, 7, 10, 15a; 65 Purd. Pa. Stat. Ann., §§ 213, 215, 216, 217, 220, 225(a). It is printed in the appendix hereto, *infra*, pp. B 1a-B 5a.

STATEMENT OF THE CASE.

This is a proceeding under the tenure provisions of the Pennsylvania Public School Code, Act of March 10, 1949, P. L. 30, § 1122, et seq., as amended, 24 Purd. Pa. Stat. Ann. § 11-1122 et seq. The three respondents, public school teachers having tenure, were dismissed in 1954 by the Board of Public Education, School District of Philadelphia, on the ground of incompetency contained in that Code.

The charge and the finding of incompetency, in each case, was based solely on the refusal to answer questions of the House Committee on un-American Activities relating to past Communist associations, under pleas of the Fifth Amendment (57a, 63a). The use of the privilege was held to be proof of a lack of civic responsibility and proper professional ideals, and of faulty judgment, and it was therefore equated with incompetency.

It was agreed that there was no statute or rule promulgated by the Board of Education which dealt in any way with a teacher's use of the Fifth Amendment in any proceeding.

The Superintendent of Public Instruction affirmed each dismissal. Separate appeals from that order were dismissed by Courts of Common Pleas of Philadelphia County. The separate appeals taken by the respondents to the Supreme Court of Pennsylvania were consolidated. That Court, by a six-to-one decision, reversed the decisions below. It held that the dismissals violated the due process clause and the privilege and immunities clause of the Fourteenth Amendment to the Federal Constitution.

The Supreme Court of Pennsylvania also specifically held that respondents' refusal to answer a Congressional Committee's questions relating to possible past disloyal associations did not constitute incompetency within the intended scope of that term as used in the Public School Code of Pennsylvania (56a, 72a-73a).

ARGUMENT.

Respondents had acquired tenure and could be deprived of their positions as teachers only for the causes enumerated in the Pennsylvania Public School Code of 1949 (1a). Petitioner dismissed them on the ground of incompetency, basing its action entirely on the fact that each had claimed the privilege against self-incrimination to refuse to answer a Congressional Committee's questions about former Communist Party affiliations.

Quite aside from the constitutional rulings challenged here, the Supreme Court of Pennsylvania held that respondents' dismissals were invalid because as a matter of state law their conduct did not amount to incompetency.

At the outset of the opinion the Court made clear that the case presented not only the constitutional issues, but also the "additional question" of whether respondents' plea of privilege "constituted incompetency within the intent of Pennsylvania's Public School Code of 1949" (56a).

After disposing of the constitutional points, the Court concluded the opinion with the distinct and independent holding that respondents' refusal to answer the questions did not amount to incompetency (72a-73a).

This holding, far from being "interwoven" with constitutional determinations, rested entirely on an analysis of the scope of "incompetency" under the Public School Code of 1949, in the light of the subsequent provisions of the Pennsylvania Loyalty Act of 1951 (B 1a-B 5a). The Pennsylvania Supreme Court declared that the latter statute is the exclusive remedy for disloyal or subversive activities or affiliations. It then held that since the questions asked of petitioners were relevant only to possible disloyalty or subversion, the mandatory procedures established by the Loyalty Act could not be ignored by the device of treating the refusal to answer as incompetency within the meaning of the Public School Code.

The Court was at pains to make clear that the decision was broader than the constitutional issues alone would have warranted. From the constitutional point of view, it was important that the dismissals had been based on a claim of federal privilege in a federal proceeding. This was what made the case different from *Board of Public Education v. Beilan*, 357 U. S. 399 (1958) (involving the questions of an administrative superior) and brought it within the authority of *Slochower v. Board of Higher Education of New York City*, 350 U. S. 551 (1956) (61a-67a). But, in defining incompetency as a matter of state law, the Pennsylvania Supreme Court went far beyond this. For it declared that where the questions relate to disloyalty or subversion, Pennsylvania will not permit dismissal for incompetency "whether the question propounded be by a Congressional Committee or by the Board of Education itself" (72a). "Anything in the *Beilan* case to the contrary is herewith overruled for the future" (73a).

The law of Pennsylvania is now declared to be that it is not incompetency per se for a teacher to refuse to answer questions about former Communist affiliations. If a teacher's tenure rights are to be declared forfeit as a result of such refusal, it can only be by way of proceedings under the Pennsylvania Loyalty Act (B 1a-B 5a). This result is reached by a natural interpretation of the relative ambits of the two Pennsylvania statutes. It poses no question over which this Court has jurisdiction.

CONCLUSION.

The decision of the Court below is based on an adequate non-federal ground, and the Petition should be denied.

Respectfully submitted,

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Appendix.

ADDITIONAL STATUTORY PROVISIONS.

Pennsylvania Loyalty Act of December 22, 1951, P. L. 1726, 65 Purd. Pa. Stat.:

Ineligibility for Employment or Appointment to Office.

No subversive person, as defined in this act, nor any person as to whom on all the evidence there is reasonable doubt concerning his loyalty to the government of the United States or the Commonwealth of Pennsylvania, shall be eligible for employment in or appointment to any office or any position of trust or profit in the government of or in the administration of the business of this Commonwealth, or of any school district, county, municipality or other political subdivision of this Commonwealth. 1951, Dec. 22, P. L. 1726, § 3. 65 Purdon's Pa. Stats. Ann. § 213.

Present Employes; Oath; Discharge.

The appointing authority of each person, including teachers and other employes of the public school system who, on the first day of March, one thousand nine hundred fifty-two, shall be in the employ of the Commonwealth of Pennsylvania or of any of its political subdivisions, other than those holding State or local elective offices of any kind, shall require such person to, and every such person shall, on or before the first day of April, one thousand nine hundred fifty-two, make a written statement, under oath or affirmation, which statement shall contain notice that it is subject to the penalties of perjury, and shall be in the following form:

"I,....., do solemnly swear (or affirm) that I will support, obey and defend the Constitution of the United States and the Constitution of this Commonwealth, and that I will discharge the duties of ..... with fidelity.

"And I do further swear (or affirm) that I do not advocate, nor am I knowingly a member of any organization that advocates, the overthrow of the government of the United States or of this Commonwealth by force or violence or other unconstitutional means, or seeking by force or violence to deny other persons their rights under the Constitution of the United States or of this Commonwealth.

"And I do further swear (or affirm) that I will not so advocate nor will I knowingly become a member of such organization during the period that I am an employee of the Commonwealth of Pennsylvania (or political subdivision thereof)."

Any persons failing or refusing to execute either statement required hereby shall be discharged immediately by the proper appointing authority. 1951, Dec. 22, P. L. 1726, § 5. 65 Purdon's Pa. Stats. Ann. § 215.

Investigations.

Any appointing authority may at any time, upon written complaint, investigate any person, including teachers and other employes of the public school system, appointed or employed by him, to determine whether he is a subversive person. If, upon any investigation, it appears that such person is a subversive person, the person shall immediately be privately and confidentially notified of the recommendation by the appointing authority. No public announcement, release, statement or comment concerning the investigation, recommendation or notification shall be made

by the appointing authority in any way whatsoever, unless and until the person so notified is discharged under section seven of this act. 1951, Dec. 22, P. L. 1726, § 6, 65 Purdon's Pa. Stats. Ann. § 216.

Hearing Before Appointing Authority.

Any person, including teachers and other employes of the public school system, who has been so notified under this act, shall have a right to a hearing before the proper appointing authority within thirty (30) days after receiving said notification. If no hearing is requested within thirty (30) days after said notification is received, the person shall immediately be discharged by the appointing authority. He may appear before such appointing authority personally, accompanied by counsel or representative of his own choosing, and present evidence on his own behalf through witnesses. The person who has been so notified shall at the same time be further informed in writing of such hearing, at least ten days before the day set for the hearing, and shall be informed therein of the nature of the charges against him; and the person who has been so notified shall be informed in the notice (1) of his right to reply to such charges in writing within ten days after the date of service, (2) of his right to a hearing on such charges before the appointing authority, which hearing may be private and confidential or may be public, at the option of the person so notified, and (3) of his right to appear before such appointing authority personally, to be accompanied by counsel or representative of his own choosing, and to present evidence on his own behalf through witnesses. If, after due hearing, it is determined by the appointing authority by a fair preponderance of the evidence that the person who has been so notified is a subversive person, as defined in this act, the person who has been so notified shall be discharged; otherwise, the recommendation shall be ignored. Said determination shall be made within sixty

(60) days after the hearing. If the appointing authority shall be comprised of three or more members, a vote of two-thirds of the members shall be necessary in order to discharge a person. 1951, Dec. 22, P. L. 1726, § 7. 65 Purdon's Pa. Stats. Ann. § 217.

Appeals to the Superintendent of Public Instruction.

After a final determination of discharge under this act by an appointing authority, any teacher or other person employed in the public school system of the Commonwealth who believes himself aggrieved by such determination may appeal on the record from the determination by an application in writing to the Superintendent of Public Instruction of the Commonwealth within twenty days after receiving written notice of such determination. The superintendent shall set a time and place for the hearing of the appeal, which hearing shall be not more than thirty (30) days after receipt thereof, and give due notice of said hearing to the appellant and to the appointing authority whose determination is under review. The hearing shall be held by the superintendent or by a person or persons, not exceeding three, designated by the superintendent in writing to hear the appeal in his behalf. The superintendent, in his discretion, may designate such person or persons to hear such appeal and to report to him. The persons so designated by the superintendent may be officers or employes of the civil service of the Commonwealth. The person or persons holding the hearing may make such inquiry as may be deemed advisable. Within sixty (60) days after the hearing on appeal, the superintendent shall affirm or reverse the findings and determination under review, and, in the case of reversal, shall order the reinstatement of the appellant, who shall be entitled to back pay from the date of his discharge. 1951, Dec. 22, P. L. 1726, § 10. 65 Purdon's Pa. Stats. Ann. § 220.

Effect and Applicability of Act.

(a) The provisions of this act shall not affect the right to discharge any person for any cause other than those provided for by this act or without cause under existing law. No procedure provided by any existing tenure or civil service law shall be applicable in any proceeding under this act. 1951, Dec. 22, P. L. 1726 § 15(a). 65 Purdon's Pa. Stats. Ann. § 225(a).